Supreme Court, U.S.
FILED
OCT 21 1996
CLERK

No. 96-433

In The

Supreme Court of the United States

October Term, 1996

CITY OF EVERGREEN, ALABAMA, HENRY LOMAX CASSADY, CURTIS HAMILTON, JERRY L. CAYLOR, JAMES C. KING, PHYLLIS M. BROCK, LARRY W. FLUKER and ELIZABETH M. STEVENS,

Petitioners,

vs.

FREDDIE L. STALLWORTH,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

RESPONDENT'S BRIEF IN OPPOSITION

KENNETH L. THOMAS
Counsel of Record
CYNTHIA W. CLINTON
THOMAS, MEANS & GILLIS, P.C.
Attorneys for Respondent
3121 Zelda Court
P.O. Drawer 5058
Montgomery, Alabama 36103-5058
(334) 270-1033

9807
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTION PRESENTED FOR REVIEW

Whether under the narrow and particularized facts of this case, Respondent was denied due process of law as found by the Supreme Court of Alabama?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Supreme Court of Alabama are those named in the caption.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional Provision Involved	1
Statement of the Case	1
A. Course of Proceedings	1
B. Facts Material to Consideration	3
Corrections of Misstatements in the Petition	7
Reasons for Denying the Writ	9
The Supreme Court of Alabama, in Deciding Respondent Had Been Denied Due Process, Did Not Reject or Misapply Applicable Federal Due Process Law, but Merely Applied Such Law to Highly Unusual Facts.	9
Conclusion	15

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Clements v. Airport Authority of Washoe County, 69 F.3d 321 (9th Cir. 1995) 13

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487 (1985) 10, 12

Logan v. Zimmerman Brush Company, 455 U.S. 422, 102 S. Ct. 1148 (1982) 13

McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) 8, 10, 13

Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908 (1981) 13

Ward v. Village of Monroeville, 409 U.S. 57, 93 S. Ct. 80 (1972) 13

Statute Cited:

28 U.S.C. § 1257(a) 1

United States Constitution Cited:

Fourteenth Amendment 1, 2, 10

Fourteenth Amendment, § 1 ..... 1, 10

Contents

Page

Other Authority Cited:

Article 1, §§ 6 and 13 of the Constitution of Alabama (1901) 1, 10

OPINIONS BELOW

The decision of the Circuit Court of Conecuh County, Alabama is an unreported decision, but is appended at 13a. The decision of the Supreme Court of Alabama has been entered, but not yet published. The opinion is appended at 1a. Petitioner's application for rehearing to the Supreme Court of Alabama was denied in an unreported decision entered June 21, 1996, and is appended at 18a.

STATEMENT OF JURISDICTION

The final judgment of the Supreme Court of Alabama was entered on June 21, 1996. This Court has jurisdiction to review the petition pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment XIV, § 1:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

A. Course of Proceedings

Freddie L. Stallworth ("Respondent" or "Stallworth") filed his Complaint for Declaratory and Equitable Relief on May 26, 1994, in the Circuit Court of Conecuh County, Alabama. Respondent sought a declaratory judgment declaring that the actions of defendants in terminating Respondent's employment with the City of Evergreen, Alabama, violated Respondent's due process rights under Article I, §§ 6 and 13 of the Constitution of Alabama (1901) and the Fourteenth

Amendment to the United States Constitution. Respondent argued that the participation of certain defendants throughout the termination and review proceedings created an intolerably high risk of bias and prejudgment, and therefore denied Respondent his right to a fair hearing before an impartial tribunal.

Named as defendants in this lawsuit were the City of Evergreen, Alabama ("City of Evergreen"); Henry Lomax Cassady ("Cassady" "Mayor Cassady" or "the Mayor"), in his official capacity as Mayor of the City of Evergreen; Curtis Hamilton ("Hamilton" or "Administrator Hamilton"), in his official capacity as City Administrator of the City of Evergreen; Jerry L Caylor ("Caylor"), James C. King ("King'), Phyllis N. Brock ("Brock"), Larry W. Fluker ("Fluker") and Elizabeth M. Stevens ("Stevens") (collectively referred to as "Petitioners"), all in their official capacities as City Council members of the City of Evergreen. On June 28, 1994, Petitioners filed their answer to the Complaint, generally denying any unlawful employment practices. No dispositive motions were filed in this matter and on the 16th and 17th days of May, 1995, the case was tried before the Honorable Charles C. Partin.

By Decree dated June 9, 1995, the trial court entered judgment in favor of Petitioners and against Respondent. Respondent filed timely Notice of Appeal to the Supreme Court of Alabama on July 18, 1995. On May 3, 1996, the Supreme Court of Alabama entered an opinion reversing the trial court's judgment. Petitioners filed their application for rehearing on May 16, 1996. On June 21, 1996, Petitioners' application for rehearing was overruled without opinion.

B. Facts Material to Consideration[1]

Stallworth was hired as the Personnel Officer for the City of Evergreen on May 23, 1988. Respondent was continuously employed in this position until his termination on March 28, 1994. The position of Personnel Officer is a classified position and the person holding such position may only be terminated for cause. (2a). In 1994, the mayor was the appointing authority for the City of Evergreen. Petitioners have never disputed Respondent's property interest and entitlement to due process protection.

By memorandum dated March 4, 1994, Stallworth was notified by City Administrator Hamilton of a termination hearing — the pre-termination hearing — scheduled for March 23, 1994 for the purpose of considering the termination of Stallworth. (2a). By memorandum dated March 15, 1994, Stallworth was notified by Hamilton of the list of charges against Respondent and the list of witnesses who would testify against Stallworth. (2a). Petitioner Cassady, Mayor of the City of Evergreen, was included in this memorandum as one of the witnesses to be used against Respondent. (R-89-91).[2] The March 15, 1994, memorandum indicated Mayor Cassady would serve as a witness against Stallworth on several of the charges and also would present documents in the matter. (R-91-92).

City Administrator Hamilton was Stallworth's immediate

---

1. The facts are set out here in lengthy detail because of their importance to the decision of the Supreme Court of Alabama. They bear out that the decision of the Supreme Court of Alabama was entirely proper in light of the unusual and egregious facts in which a decision maker's bias infected both pre-and post-termination proceedings.

2. The designation "R - #" refers to the Reporter's Transcript of the trial below.

supervisor. (2a). The disciplinary (termination) proceedings against Stallworth were initiated by Hamilton and the mayor. (2a). Nine of the twelve charges lodged against Stallworth as the basis for his termination were prepared by the mayor and based on the mayor's own findings and investigation. (R-169-170). The mayor identified the specific wording of the charges as "my words." (R-169).

On March 23, 1994, the pre-termination hearing was held. At the hearing, Stallworth's lawyer objected to Administrator Hamilton serving as the hearing officer because the City had been notified that he would testify in support of the charges lodged against Stallworth. (2a). At the time Hamilton took the stand as a witness, he had served as the hearing officer for approximately five (5) hours. Notwithstanding the objections, Hamilton continued to serve as the hearing officer. (R-94).

During the pre-termination hearing, Hamilton was called as a witness and the mayor served as the presiding officer for the hearing (2a), even though the City had called the mayor as a witness against Respondent in this same hearing. Counsel for Respondent objected to the mayor serving as the hearing officer because the mayor had testified against Stallworth for approximately three (3) hours earlier in that hearing (2a). At various times during the pre-termination hearing, the mayor served both as witness against Stallworth and as the presiding officer for the hearing. By memorandum from the mayor to Hamilton, dated March 31, 1994, the mayor confirmed that he "took the chair as Hearing Officer" while Hamilton was a witness. At the pre-termination hearing Petitioner Caylor, another City Council member, also testified against Respondent. (2a).

By memorandum dated March 28, 1994, Administrator Hamilton and Mayor Cassady advised Respondent of his

termination from employment and his right to appeal to the Personnel Review Board. (2a-3a). Stallworth appealed his termination to the Review Board for the City of Evergreen ("Review Board") (R-183) and a hearing was held before a five member committee. At this Review Board hearing, the mayor, Hamilton and Caylor were called by the City as witnesses against Stallworth. (3a). The mayor testified at the hearing before the Review Board that he had no doubt that Stallworth was guilty of the charges made the basis of Stallworth's termination from employment.

The Review Board voted 3 to 2 to affirm the mayor's recommendation for termination (3a). Three of the Review Board members voted to affirm Stallworth's termination. However, one of the members who voted to affirm the termination noted on his decision that "if this is not unanimous we recommend a six (6) month suspension." Two of the Review Board members voted to reverse Stallworth's termination. One of the two members who voted to reverse Stallworth's termination noted on his decision that "the City needs to investigate Mr. Hamilton in an effort to be fair." The recommendations from the Review Board noted that the Stallworth termination situation was "troublesome" and that Petitioner City of Evergreen was "negligent in not practicing progressive, immediate action." As a result of the allegations made the basis of Respondent's termination, the Review Board recommended that Administrator Hamilton, Stallworth's supervisor, be investigated; that Stallworth be suspended rather than terminated if the Review Board's recommendation was not unanimous; and that the City of Evergreen practice progressive discipline. By letter dated June 15, 1994, the mayor suspended Hamilton without pay for one week.

The final determination as to Stallworth's termination was within the authority and sole province of the City Council. (3a).

The City of Evergreen Personnel Handbook provides that "the Mayor and Council will review cases heard before the Personnel Review Board and make the final determination." (3a and 42 a).

On April 19, 1994, the City Council, of which Mayor Cassady and Caylor are members, considered Respondent's appeal of his termination. At the April 19, 1994, meeting, City of Evergreen Attorney Frederick Stevens explained to the City Council members that they were excluded from the Review Board hearing because "if you heard the Review Board proceedings, then you would be in no position to be sitting in the Council's position, which is in the third step." (4a).

At the City Council meeting Caylor abstained from voting on the issue of Respondent's termination because Caylor had testified against the Respondent in the pre-termination and Review Board hearings. (3a). City Council member Elizabeth Stevens voiced her concerns at the meeting regarding Caylor participating in the vote on Stallworth's termination because Caylor had been a witness in the preceding hearings. (R-344). Another City Council member, Fluker, then voiced concerns about the mayor voting on Stallworth's termination. The mayor refused to address the issues raised by City Council member Fluker. Fluker implored the mayor "in all fairness" to abstain from voting on Stallworth's termination. The mayor's response was "I am voting. I just did. I voted." At the April 19, 1994, City Council meeting the mayor voted to uphold the Respondent's termination. (3a). The City Council voted to uphold Stallworth's termination by a vote of three in favor, two opposed and one abstaining. (4a). Mayor Cassady cast the decisive vote to uphold Stallworth's termination.

The issue of Stallworth's termination was brought before the City Council by the mayor. The City Council members, with

the exception of the mayor and Caylor, were not privy to the evidence and testimony presented to the Review Board on Stallworth's determination. ( ). The mayor did not give the City Council members any tape recording, transcript or other evidentiary materials concerning Stallworth's termination proceedings. The City Council did not have the benefit of hearing testimony from witnesses, judging the credibility of witnesses or viewing evidentiary documents. Mayor Cassady conveyed only the vote and findings of the Review Board to the City Council.

Several City Council members expressed concerns about making an informed decision on Stallworth's termination without tape-recordings or other evidentiary material pertaining to Stallworth's termination. (4a). Another City Council member, Stevens, voiced concern regarding making a determination as to Stallworth's termination because the City Council was being asked to "be jurors who had not sat in on the trial." (R-344-345).

CORRECTIONS OF MISSTATEMENTS IN THE PETITION

The opinion of the Supreme Court of Alabama correctly sets forth the extreme and egregious nature of the facts in this case. The opinion Petitioners seek to have this Court review accurately and properly responded to the grave nature of Petitioners' denial of basic due process to Respondent.

Petitioners misstate the extent and breadth of the opinion issued by the Supreme Court of Alabama. Notably, Petitioners state in the petition:

> The Alabama court rejected the trial court's reliance on *McKinney v. Pate*, 20

> F.3d 1550 (11th Cir. 1994), *cert denied, McKinney v. Osceola County Board of County Commissioners*, __ U.S. __, 115 S.Ct. 898, 130 L.Ed.2d 783 (1995) which holds that procedural due process does not require an impartial decision maker at a pretermination hearing if adequate post deprivation remedies exist.

In its opinion, the Supreme Court of Alabama noted that the trial court's reliance on *McKinney v. Pate* was misplaced because of the obviously distinguishable facts. The Alabama court properly emphasized the fact that, unlike the present case, the plaintiff in *McKinney* failed to take advantage of state court remedies and was afforded an *adequate* post-deprivation hearing. Contrary to Petitioners' assertion, the Alabama court clearly acknowledged that "the very nature of governmental entities will make it nearly impossible in many situations to find anyone within the governmental entity to serve as hearing officer who has been completely shielded from any contact with the subject matter of the proceeding . . ." (8a-9a).

Petitioners have failed to direct this Court to the Supreme Court of Alabama's proper emphasis on both the flagrant bias present in the termination proceedings and the absence of adequate post-termination remedies at the final decision making stage. The particularly egregious facts clearly demonstrated an absence of due process. The Alabama Supreme Court's careful tailoring of its ruling to those facts reflects, contrary to Petitioners' suggestion, that such court did not announce a rule of constitutional law of general application; much less one in conflict with precedent of this Court or the federal appellate courts, and shows the improbability that the alleged errors of law will find recurring expression.

REASONS FOR DENYING THE WRIT

THE SUPREME COURT OF ALABAMA, IN DECIDING RESPONDENT HAD BEEN DENIED DUE PROCESS, DID NOT REJECT OR MISAPPLY APPLICABLE FEDERAL DUE PROCESS LAW, BUT MERELY APPLIED SUCH LAW TO HIGHLY UNUSUAL FACTS.

The May 3, 1996, Opinion of the Supreme Court of Alabama neither rejected nor extended controlling federal law concerning due process requirements. Additionally the judgment of the Alabama court can be sustained on an independent ground of state law. The Alabama court fully considered the particularized facts and correctly decided the issue as raised by these unique facts.

Petitioners err in contending that the holding of the Supreme Court of Alabama vastly expanded pre-termination due process requirements. Moreover, the holding of the Alabama Court does not unduly burden public employers nor directly conflict with decisions of this Court or any United States Circuit courts addressing this issue.

The Alabama court never opined that the pre-termination hearing officer must be totally unaware of the disputed facts. To the contrary, in its Opinion the Alabama court acknowledged "that the very nature of governmental entities will make it nearly impossible in many situations to find anyone within the governmental entity to serve as hearing officer who has been completely shielded from any contact with the subject matter of the proceeding." However, the Alabama court properly held that, notwithstanding the above, a "pre-termination hearing completely devoid of due process of law" would nullify the due process principles established by the United States Supreme

Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

Moreover, the Alabama decision did not render post-deprivation remedies irrelevant to constitutional analysis. Indeed, the Alabama court clearly and correctly held that "[t]he hearing before the Review Board would have comported with the independent due process requirements of an adequate post-termination hearing if the Review Board had been the final arbiter of Stallworth's termination." The evidence is undisputed that the final determination with regard to Respondent's termination was within the sole province and authority of the Evergreen City Council. The City of Evergreen Personnel Handbook provides that "the Mayor and Council will review cases heard before the Personnel Review Board and make the final determination." It is clear that the intolerable bias and prejudice of Mayor Lomax Cassady permeated both Stallworth's pre-termination and post-termination review proceedings. It was this *continuing* presence of egregious bias and prejudice, not just some degree of bias at the pre-termination hearing, as Petitioners misleadingly suggest, which violated Respondent's right to due process.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits any State from depriving "any person of life, liberty, or property, without due process of law." United States Constitution, Amendment XIV, § 1. This amendment provides constitutionally protected procedural due process. *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994). Furthermore, Article I, §§ 6 and 13 of the Constitution of Alabama (1901) prohibits the deprivation of life, liberty or property without due process.

Petitioners failed to make any reasonable argument that the procedures employed in Stallworth's termination were fair or

comported with the intent or requirements of due process. It is undisputed that the post-termination hearing before the City Council was tainted with bias. Making the City Council the final arbiter was the City's choice, but this voluntary choice cannot be used to circumvent due process requirements.

Petitioners give the Alabama opinion an inappropriately broad reading and conjure implications cloaked in alarmist predictions, which bear no resemblance to the decision actually rendered. The Alabama opinion is a moderate and apposite decision made in response to extreme facts — facts so specific and so objectionable, and facts recounted specifically by the Court in its opinion — that the decision, by its own terms, may well be *sui generis*. The decision should stand as it is: without extending existing law, it cautions that overt, egregious and repeated departures from due process will not be countenanced. Indeed, the Alabama opinion did not vastly expand due process requirements, but merely followed and tracked the well established precedent of this Court, the United States Court of Appeal for the Eleventh Circuit and Alabama courts that prohibits the obviously substantial bias and prejudice present here.

The Alabama court saw two extraordinary facts which dictated the ultimate finding of a denial of due process. First was the flagrant circumstance of the hearing officer relinquishing the gavel, testifying as a prosecution witness, then re-claiming the mantel of decision-maker. The Court makes specific note of this fact:

> It [ ] clearly offends the most basic traditional notions of due process to have a person serve as a hearing officer in a case in which he or she testifies as a material witness.

The second extreme circumstance of the case was the insertion and re-insertion of the mayor's bias throughout the process. The mayor concurred in the original recommendation to terminate (2a); he testified against Stallworth at the pre-termination hearing (2a); he assumed the role of hearing officer when the presiding hearing officer in turn testified against Respondent (2a); he (along with the hearing officer) advised Stallworth that he was being terminated (2a); the mayor then testified against Stallworth before the Review Board (3a); and, finally, he refused to recuse himself or abstain and cast the deciding vote to terminate Stallworth as part of the council's "final determination". (4a). The Alabama court in its footnote 1 concluding its opinion, carefully limits its decision to this second factual circumstance. (11a).

Petitioners also challenge the Alabama court's language in its footnote 1 (language which very much limits the court's decision), by asserting that the "Alabama court mistakenly believes that a full panoply of due process protection must accompany each stage of a disciplinary proceeding, rather than, as this Court has held, some meaningful state of the process." The City's argument confuses a valid proposition with the factual circumstance at hand. The valid proposition, with which we readily agree, is: state law and other sources of protective interests determine whether due process is guaranteed, but it is the Constitution which defines the specific procedures required by the due process clause. *Loudermill, supra,* 470 U.S. at 540-41. Applied here, the proposition means this: when the City's own policies provided that "[t]he mayor and council . . . will make the final determination" with respect to employee terminations, the mayor and council as "final determination" makers were required to provide the employee with federally prescribed due process in that decisive, post-termination phase. Plainly, the Alabama court's holding in footnote 1 is consistent with federal constitutional law, does not extend it, but simply

applies it to the meaningful final stage in the state prescribed procedural chain.

In support of their petition, Petitioners mistakenly rely on the holdings in *Parratt v. Taylor*, 451 U.S. 527, 101 S. Ct. 1908 (1981) and *McKinney v. Pate*. Both of these cases are factually dissimilar from the present case. *Parratt* involved a prisoner who alleged inadequate due process because of his lost or stolen personal property. Indeed, the United States Supreme Court in *Logan v. Zimmerman Brush Company* distinguished between a loss of personal property through a random act and "established state procedures" that destroy procedural safeguards — as the City's procedures did here. 455 U.S. 422, 436, 102 S. Ct. 1148, 1157 (1982).

In *McKinney v. Pate* the Eleventh Circuit clarified its position with respect to the necessity of a plaintiff to take advantage of available adequate state remedies in procedural due process claims. *McKinney v. Pate*, 20 F.3d at 1563. In the present case Stallworth did just that by seeking a remedy for the bias in state court. Moreover, *McKinney v. Pate* embraces well settled law that the State must make available the means by which an employee may receive redress for any pre-termination due process deprivation. *McKinney v. Pate*, 20 F.3d at 1562. Furthermore, the other cases cited by Petitioners lack the extreme and horrendous facts present in this case. Petitioner was never afforded redress for his due process deprivation because the final decision maker charged with reviewing personnel decisions, was tainted with an intolerable degree of bias and prejudgment. "A biased proceeding is not a procedurally adequate one. At a minimum, Due Process requires a hearing before an impartial tribunal." *Clements v. Airport Authority of Washoe County*, 69 F.3d 321, 333 (9th Cir. 1995) (citing *Ward v. Village of Monroeville*, 409 U. S. 57, 59-60, 93 S. Ct. 80, 83 (1972)).

Because of the mayor's biased participation throughout the pre-and post-termination proceedings, the entire process was contaminated with bias and prejudgment. Moreover, theacts of both Hamilton and Cassady — in serving both as witnesses against Respondent and as hearing officers — at the March 23, 1994 pre-termination hearing foreclosed any possibility of a fair hearing before an impartial tribunal. Furthermore, any implied curative effect of the Review Board hearing should be disregarded in light of the following: (1) the inconclusive outcome as to any discipline of Stallworth; (2) the fact that the Review Board was not the final decision maker; and (3) the fact that the City Council was the final decision maker. The narrow specific facts of this case demonstrated a complete absence of due process and fairness at both the pre-termination and post-termination stage.

CONCLUSION

As recited in the Alabama court decision, Stallworth argued that "the involvement of biased decision-makers throughout the termination review process . . . denied him due process." (8a). That opinion recognized the effect of the pervasive injection of bias. The decision's recitation of the patent due process departures at the pre-termination hearing, and its notation of the continued infusion of bias at the "final determination", is consistent with a pragmatic, factually-oriented inquiry into whether due process has been accorded. The Alabama court's conclusion in this case was mandated by the facts of the case, and its decision poses none of the harm portended by Petitioners.

Respectfully submitted,

KENNETH L. THOMAS
Counsel of Record
CYNTHIA W. CLINTON
THOMAS, MEANS & GILLIS, P.C.
Attorneys for Respondent
3121 Zelda Court
Post Office Drawer 5058
Montgomery, Alabama 36103-5058
(334) 270-1033